No. 17821

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE NEW ZEALAND INSURANCE COMPANY, LIMITED,
Appellant,

vs.

LOUIS LENOFF and ELLA LENOFF,
Appellees.

APPELLEES' BRIEF.

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Statement of Jurisdiction.

This appeal is from a final judgment, entered January 25, 1962, in the United States District Court for the Southern District of California, Central Division. Jurisdiction of the District Court arose because of diversity of citizenship of the parties and an amount in controversy in excess of $3,000. Jurisdiction of the Court of Appeals exists by reason of 28 U. S. C. 1291.

Introduction.

This action was commenced by Louis and Ella Lenoff upon one or both of two successive policies of insurance issued by Defendant and Appellant, New Zealand Insurance Company, Limited (herein referred to as "New Zealand") to recover the cost of repairing real property damaged by earth movement. Because of find-

ings of the Trial Judge that the damages were suffered during the term of the policy later in time [Ex. 2], only that policy is considered on this appeal.

Exhibit 2 is a California Homeowners form "C", issued by New Zealand for the term commencing November 5, 1955, and ending November 5, 1958. In this form of policy, coverage is afforded for physical loss to the insured property caused by any peril or perils not specifically *excluded* from the policy by its terms.

The present appeal involves principally Appellant's contention that damages to Plaintiff's home were caused by an excluded peril, *i.e.*, "settling" as that word is used in exclusion (g) of the policy. Another contention is that the loss suffered was not a fortuitous event, as is required for insurance coverage. Other contentions pertain to the amounts of damages recoverable and bases for computation of interest.

Statement of the Case.

Plaintiffs' property consists of a one-story, single family dwelling, situated at 3437 Longridge Avenue, in Sherman Oaks, California. It contains some 2250 square feet of living space, with attached garage, and is constructed on a concrete slab foundation. [2 Tr. 9:17-21; 12:24-13:2.][1]

At this location, Longridge Avenue runs generally north and south, sloping upward to the south. [2 Tr. 7:6-10.] The Lenoff dwelling is situated on a lot on the west side of Longridge, the south edge of which is approximately level with Longridge, but with the north

[1] "1 Tr." refers to Volume I of the Transcript; "2 Tr." refers to Volume II. The number preceding the colon refers to the page, and the number following, to the line.

edge about six feet above grade. [2 Tr. 8:3-8.] A building pad extends westward from the street about 100 feet, at which point the lot rises in a hill or bank. [2 Tr. 7:16-23; 13:3-10; 7:24-8:2.]

Prior to development, the natural terrain at this location was a steep canyon. [2 Tr. 198:14-16.] Building sites were created by filling in the bottom of the canyon and cutting into the canyon side. [2 Tr. 198: 16-21.] Thus, the part of the Lenoff's lot where the dwelling was situated consisted of compacted fill, over uncompacted fill, resting on natural soil. [1 Tr. 32: 9-11; Ex. "A".]

In 1952, Julius Solomon, a building contractor, purchased the lot from the developer and constructed the Lenoff home. [2 Tr. 6:8-22.] The Lenoff's bought the property in 1953, and moved in shortly before Christmas of that year. [2 Tr. 73:8-22.] At the time of purchase, the building was carefully inspected and found to be in good condition, with no indication of any defect. [2 Tr. 47:8-48:9; 73:13-15.]

About Thanksgiving, 1955, the Lenoffs' home suddenly began to sink and disintegrate. Without a trace of prior damage to the property, the house abruptly developed numerous and extensive cracks in the walls and floors, as much as one-half inch wide; the east side of the house and attached garage dropped some 12 inches; the floors tilted to a marked degree, the doors and windows could not be opened or closed properly, and openings and separations as much as two inches appeared in the pavement, driveway, and patio areas around the house. [2 Tr. 15:14-17:22; 42:19-25; 58:4-60:3; Exs. 5, 6.]

About two years later, the east side of the house dropped an additional six inches, tilting of the floors increased, the number and width of cracks in the walls and floors increased, and wider cracks occurred in the pavement and patio areas around the house. [2 Tr. 18:10-15; 61:19-62:4.] Appellant does not dispute on this appeal the finding of the Trial Judge that these later manifestations of damage were but an enlargement of a loss which would continue until repair. [1 Tr. 33:12-27.]

To effect repairs to the structure, the Lenoff's engaged Solomon, the original builder, who recommended employment of an engineer, soil expert or both. [2 Tr. 41:3-8.] The Lenoff's consulted a geologist and a mechanical and civil engineer specializing in foundation and subsidence problems. [2 Tr. 130:9-131:7; 168:25-169:1.]

The geologist examined aerial photographs of the area taken before the grading and development was done and made a physical examination, including the boring of test holes in the soil. [2 Tr. 198:10-13.] According to his findings, the filling of the canyon in the development of building sites, and the addition of compacted fill, had created a barrier to the natural flow of water, which otherwise would have escaped down the canyon. [2 Tr. 198:18-21.] Underground waters resulting from percolation of water from irrigation of lawns and rainfall, would be impounded behind the compacted fill and would gradually build up. [2 Tr. 198:18-24.] Such impounded subsurface waters coming into contact with loose and uncompacted fill, such as under the Lenoff's property, would create an unstable condition of the soil which would facilitate and accelerate subsidence. [2 Tr. 198:24-199:5.]

Stability of the house could not be restored without conducting extensive repairs to the foundation and stabilization of the soil beneath the house. Without such stabilization and foundation repair, further damage would certainly result to the building and there was a "very good possibility" of collapse. [2 Tr. 143:10-144:9; Ex. "A".] The only feasible method of accomplishing such repair, was by constructing an underpinning of beams and caissons sunk to bedrock. [2 Tr. 136:7-11.]

When holes for caissons were bored, the earth for a depth of some 18 to 20 feet below the surface was found to be normal soil. [2 Tr. 20:11.] Below that level, for an additional 10 to 12 feet, the earth proved to be very "mucky, . . . the soil was so wet that it just got very muddy and poured off of the shovel—poured out of the shovel." [2 Tr. 20:13-15.] Below that level, they encountered "a regular stream" of water, which was pumped out before reaching the bedrock, some 30 to 32 feet below the surface. [2 Tr. 20:16-21:3.]

Costs of repair, including stabilization of the foundation, were itemized in Plaintiffs' Exhibit 4, and total $20,938.47. [2 Tr. 28:6-21; 35:9-23.] It was stipulated that the sums expended were reasonable for the work done. [2 Tr. 35:9-12.]

On June 28, 1956, after initial appearance of damage, but before repairs were accomplished, Plaintiffs filed proof of loss in the amount of $15,000. Five days after receiving Plaintiffs' proof of loss, New Zealand attempted to cancel the homeowners' policy, which attempt, the Trial Judge found to be ineffectual. New Zealand thereupon requested an appraisal

pursuant to the policy terms. The appraisers made an award in the amount of $8,684.50, such amount including only the cost of repairing the dwelling and extra living expenses. [Ex. I.] It was stipulated during the trial that the award did not include any portion of the cost of underpinning and stabilizing the foundation. [2 Tr. 216:21-219:9.]

New Zealand thereupon denied coverage for any portion of the loss, including the amount of the appraisal. The Lenoff's, thereafter, proceeded to effect repairs in accordance with such right under the policy. This litigation ensued.

Statement of Issues.

I.

Was the Trial Judge in error in concluding that physical loss to Plaintiffs' dwelling was not proximately caused by an excluded peril?

II.

Was the *occurrence* of a loss, as distinguished from possibility, a fortuitous event?

III.

Were the costs of stabilizing the soil beneath the dwelling properly an item of repair?

IV.

Are Appellees precluded by the appraisers' award from recovery of their full measure of damages?

V.

Was Appellant's attempted cancellation effective to terminate its obligation to repair damage from a continuing loss?

VI.

When did damages become ascertainable?

Summary of Argument.

I.

An excluded peril excepts coverage under an all risk policy only when it proximately causes the loss. The proximate cause of the loss herein, accumulation of underground water, was not an excluded peril.

II.

The claim of inevitability as precluding a fortuitous event for insurance coverage purposes has been rejected by California courts.

III.

The repair and stabilization of the foundation and subsoil were an integral and essential part of the repair of the dwelling.

IV.

The appraisal award does not preclude Appellees from recovering their full measure of damages, since it failed to include all items of repair, was grossly inadequate, and, in any event, Appellant is estopped to rely upon it because of its own breach of contract.

V.

Defendant could not relieve itself, unilaterally, of its obligation to compensate for repairs of damages during a continuing loss.

VI.

Damages were ascertainable prior to filing of suit, and were fully established when repairs were accomplished.

I.

The Activating or Proximate Cause of Plaintiffs' Loss Was Not "Settling" as That Term Is Used in Exclusion (g) but the Accumulation of Underground Water, a Non-Excluded Peril.

Defendant insurer relies upon Exclusion (g) of the Policy which specifies that the policy does not insure against "loss by . . . settling . . .". Defendant urges that the earth movement beneath Plaintiffs' dwelling was a downward displacement of the soil, that such movement may be described as a "subsidence", that subsidence is equivalent to "settling", and hence, as a matter of law, the trial judge should have concluded that Plaintiffs' loss was occasioned by "settling" and hence excluded.

Sabella v. Wisler (1963), 59 A. C. 29, a recent decision of the California Supreme Court, has now clarified the law pertaining to exclusions identical with the one relied upon by defendant herein. In *Sabella v. Wisler,* the insured's home had been constructed upon a building site made up of fill material which had not been properly compacted. Approximately three and a half years after the dwelling was constructed, the dwelling subsided at various locations in distances ranging from 2″ to 7″. The trial court found that between November of 1958 and February 1, 1959, some three to six months prior to the first manifestation of appreciable damage, a sewer pipe from the house had begun to leak, allowing water to infiltrate the unstable earth beneath the dwelling, causing the house to sink.

As in the present case, the insurer's policy covering the dwelling, contained an exclusion for settling. The District Court of Appeal had interpreted the exclusion

to be limited to "normal settling", and had reversed the judgment in favor of the insurer, denying recovery for the amount of damage sustained. The Supreme Court, however, ruled that the term "settling" connoted the tendency of uncompacted earth to settle of its own weight and with the weight of a structure which the earth might support, and that the term as used in the Policy contained no limitation as to the amount of compaction or the rapidity with which the compaction might occur.

Nevertheless, the Supreme Court reversed the judgment in favor of the insurer upon the basis of findings of the trial court that the earth movement had been triggered by the interjection of sub-surface waters leaking from the defective sewer pipe. The Supreme Court pointed out that under Sections 530 and 532 of the California Insurance Code, an excluded peril is not excepted unless it is the proximate cause of the loss. The fact that an excluded peril may have joined with a non-excluded peril in contributing to the loss or may have been the immediate cause of the loss, does not eliminate coverage if a non-excluded peril is the "proximate cause" in the sense of setting in motion the events which resulted in damage.

In reaching this conclusion, the Supreme Court disapproved any contrary implications appearing in a prior opinion of the District Court of Appeal in *Hughes v. Potomac Insurance Company* (1962), 199 Cal. App. 2d 239, 18 Cal. Rptr. 650. In the *Hughes* case, a policy had excluded losses resulting from surface waters. The insured's dwelling was constructed on a lot which abutted with a stream. The Plaintiffs' property suffered substantial damage during a time of high

waters in the creek, when the earth at the rear of their lot slid into the creek. The issue before the trial court was whether the cause of the earth slippage was the abnormally high waters or whether it was the result of a build-up of subterranean water pressure leading to the failure of the soil. The trial court found that the cause of the earth slippage was the build-up of subterranean water pressures, not an excluded risk, and awarded recovery under the policy. The District Court of Appeal in affirming that judgment ruled that the findings of the trial court must be interpreted as stating that the build-up of subterranean water pressure had caused the earth failure without any contribution to the damage by abnormally high surface waters in the stream.

The effect of the Supreme Court decision in *Sabella v. Wisler* is to eliminate that portion of the *Hughes* decision which seemed to require that the non-excluded peril be the cause of the loss without contribution from an excluded peril. Thus, the law of California may now be clearly stated to be that if a non-excluded peril triggers or sets in motion the events which lead to the loss, coverage will be afforded despite contribution from an excluded peril and despite the fact that an excluded peril may be the more immediate cause of the damage.

The present case was decided in the trial court prior to the Supreme Court decision in *Sabella v. Wisler,* while the case was still pending in the District Court of Appeal. Accordingly, Appellant's brief and much dis-

cussion in the trial court was devoted to the question of whether the terminology of Exclusion (g) of the Home Owner's Policy would exclude all kinds of "settling". Several pages of Appellant's Opening Brief are devoted to a discussion of that issue.

Although in the present case the trial judge concluded that the term "settling" should be limited to minor or ordinary settling, in view of the *Sabella v. Wisler* decision, this is no longer a problem.

Thus, in the present case, the trial judge found on undisputed testimony that:

> "The land beneath the structure consisted of compacted fill earth on top of uncompacted fill, resting on natural soil. The strata was so situated as to permit water to filter downward and to saturate the soil beneath the structures, and thereby to create an unstable condition of the soil. Such condition existed prior to issuance by defendant of both of its policies of insurance, but such condition was not known by any of the parties hereto until visible damage to the house occurred late in November of 1955, nor is there any evidence that said condition was capable of ascertainment prior to late in November of 1955.
>
> Such instability caused prior to and during the policy period an extensive subsidence of the soil beneath the dwelling and garage." [1 Tr. 32:9-23.]

This finding is fully supported. Thus, the only evidence on the subject establish that the precipitating cause of the instability of the earth beneath Plain-

tiffs' dwelling was the accumulation of underground water which had been impounded in the natural canyon underneath plaintiff's dwelling by the addition of compacted fill. There was no manifestation of damage for more than two years after the house was constructed and examination of borings made during the sinking of caissons but the repair work disclosed a great amount of sub-surface water which had created an unstable underlying soil. Dr. Stone, the geologist, in response to a question predicated upon his examination and upon the undisputed facts that damage was not manifested until November of 1955, stated that the sudden appearance of earth movement was consistent with his opinion as to the existence of subsurface waters and he further testified:

> "If there was no water there, it is likely that we would have had very, very little subsidence, or very little compared to what actually occurred with the presence of the water." [2 Tr. 201:20-23.]

It is submitted, therefore, that any "settling" within the meaning of the New Zealand Policy, was not a proximate cause of the damage to Plaintiffs' dwelling, but was at most merely a cause contributing only in a very minor degree, and more accurately was the result of a non-excluded peril, the accumulation of sub-surface waters. Under such circumstances, there is clearly no merit to the contention of Appellant, that, as a matter of law, the loss to Plaintiffs' dwelling was caused by a peril excluded from the policy.

II.

Defendant's Contention That Plaintiffs' Loss Was Inevitable and Not Fortuitous and Therefore Not Covered, Is Contrary to California Law as Stated in Sabella v. Wisler.

Defendant contends that because the condition of instability had existed in the soil underlying Plaintiffs' property prior to the issuance of the Home Owner's Policy, the resultant loss was inevitable and hence not a fortuitous risk. No California decision is cited in support of that proposition.

An identical contention was rejected by the District Court of Appeal in *Snapp v. State Farm Fire & Casualty Co.* (1962), 206 A. C. A. 919, which ruled that the decisions relied upon by Appellant in its present Brief were not in point. In the *Snapp* case, there was evidence that the structure in question had been erected on improperly compacted fill. A contention identical with that made herein was made by the insurer in that case (which insurer incidentally was represented by the same counsel as herein). The District Court of Appeal ruled, as follows:

> "If sufficient information were available to geological experts, the possibility or probability of *all* earth movements might be forecast with accuracy. Further, after any movement of land has occurred it might be said to have been 'inevitable' with semantic correctness, but such 'inevitability' does not alter the fact that at the time the contract of insurance was entered into, the event was only a *contingency* or *risk* that might or might not occur within the term of the policy." 206 A. C. A. at p. 922.

The *Snapp* case was expressly approved in *Sabella v. Wisler,* which quoted with approval a portion of the language appearing hereinabove. Furthermore, it was pointed out in *Sabella v. Wisler* that despite the possible inevitability of movement as a result of the underlying geological formation, the interjection of waters into the uncompacted formation was "an unanticipated external event or casualty, operating to trigger the greatly accelerated action of possible inherent vices." (59 A. C. at p. 43.)

In the present case, although the possibility of damage because of the uncompacted underlying fill beneath the Lenoffs' Property was present from the time of construction, it was expressly found that the condition was unknown to any of the parties and was not capable of ascertainment prior to November of 1955. [1 Tr. 32:13-19.] Moreover, the proximate cause of the failure in the present case was accumulation of underground waters, a condition depending upon a number of variable and unforeseeable factors for its existence. There is no evidence that it could be anticipated that the waters would percolate to the location that they did beneath the Lenoffs' Property, that the amount and sources were to be expected, or that it could be foreseen that the uncompacted fill would result in the interjection of such waters into the unstable soil.

III.

The Trial Judge Properly Included the Costs of Repairing and Underpinning the Foundation Among the Costs of Repairing Plaintiffs' Dwelling.

Defendant contends that the Trial Judge erred in allowing recovery of the expense of repairing and stabilizing the foundation. Thus, it is urged, recovery under the policy is limited to repair consisting of replacement of damaged parts with materials identical to those existing before the damage occurred. By awarding damages for the cost of underpinning, Defendant argues, the Trial Judge required payment for a better foundation than had existed before the loss.

In *Pfeiffer v. General Insurance Corporation* (S.D. Cal. 1960), 185 F. Supp. 605, the insureds under a homeowners policy suffered damage to their dwelling from a landslide. The evidence showed that repairs to the structure would require expenditure of $8,000, but to stablize the soil beneath the house would require an expenditure of $23,000. As phrased by Judge Harris, the issue before the Court was whether the policy covering plaintiffs' "dwelling" covered the land underlying the dwelling. In holding that such coverage was provided, Judge Harris stated:

> "In the case at bar it is manifest that the land underlying the house must be encompassed within the word 'dwelling' unless the policy is to be interpreted as illusory. It appears to this court, and the court finds, that no amount of repairs to the present structure *alone* will cure the damage or replace the dwelling until the earth movement under the structure is stablized." (P. 608.)

The *Pfeiffer* case was cited and quoted from with approval in the decision of the California District Court of Appeal in *Hughes v. Potomac Ins. Co.* (1962), 199 Cal. App. 2d 239, 18 Cal. Rptr. 650, involving a similar contention. There, damage to the structure itself, exclusive of the underlying soil, amounted to only $50, while the cost of stabilizing the soil amounted to $19,000. In allowing recovery for the latter item, the District Court of Appeal stated:

> "Respondent correctly points out that a 'dwelling' or 'dwelling building' connotes a place for occupancy, a safe place in which to dwell or live. It goes without question that respondents' 'dwelling building' suffered real and severe damage when the soil beneath it slid away and left it overhanging a 30 foot cliff. Until such damage was repaired and the land beneath the building stabilized, the structure could scarcely be considered a 'dwelling building' in the sense that rational persons would be content to reside there." (199 Cal. App. 2d at 249.)

The argument of Appellant in the present case fails to take into account the fact that the interjection of underground waters into the soil beneath the Lenoffs' home changed the character of the soil from that having merely a potential for instability to soil actually unfit to accommodate the dwelling. The testimony of the experts was that, in the absence of underpinning or similar stabilization, further damage to the dwelling would surely occur, and, in fact, collapse was very possible. Prior to the injection of underground waters, the Lenoffs' dwelling had a foundation which supported it without visible damage for more than two and one-half years. The repair work served simply to restore the dwelling to a condition of safety, and was accomplished without anything more than the expenditures necessary to achieve that condition.

IV.

Respondents Were Not Precluded by the Appraisal Award From Recovery of the Proper Measure of Their Damages.

Defendant urges that the appraisal award is conclusive as to the amount recoverable by plaintiffs to redress their loss. Although it is stipulated that the amount of repairs effected total $20,938.47, it is urged that recovery should be limited to $8,684.50, the amount fixed by the appraisers for repair of the structure without including costs of repairing and stabilizing the foundation. It is submitted, however, that the Trial Judge quite properly rejected such contention, because:

(a) The Appraisers, in Failing to Consider the Cost of Stabilizing the Underlying Soil, Imperfectly Executed Their Powers so That a Mutual, Definite and Final Award Was Not Made. (Calif. Civ. Code, Section 1288(d).)

The Supreme Court of California, as early as 1859, stated:

> "The rule is general, that arbitrators must pass upon all matters submitted or their award will be invalid. If several matters are specified in the submission, and the award does not disclose that each is determined, it is defective on its face, and can be set aside on motion. But if the submission is general, of all matters in controversy, without specification it is not necessary that the award should embrace any matters except those which are laid before the arbitrators. These last, however, must be passed upon, or the award will be void

in toto, and be set aside upon a proper showing of the omission."

Muldrow v. Norris (1959), 12 Cal. 331, 339.

In the recent case of *Hughes v. Potomac Ins. Co.* (1962), 199 Cal. App. 2d 239, 18 Cal. Rptr. 650, the California District Court of Appeal refused to be bound by an appraisal award which failed to include all items of repair to the dwelling. Thus, it was held:

> "Appellant also asserts that the appraisers' award of $50 for loss and damage to the 'dwelling' must be controlling. This position is untenable. The appraisers found that the cost of a retaining wall and fill was $19,000. The function of appraisers is to determine the amount of damage resulting to various items submitted for their consideration. It is certainly not their function to resolve questions of coverage and interpret provisions of the policy. The mere fact that they apparently considered the 'dwelling' to be limited to the house and attached garage did not deprive the court of its right to interpret the policy in a different manner." (199 Cal. App. 2d at 253.)

Although it is presumed that the award encompasses all matters before the abitrators, in view of the stipulation in the trial court that the award did not include the costs of stabilizing the foundation, the Trial Judge quite properly concluded that the award did not encompass all items before the abitrators, as, indeed, an examination of the award itself discloses.

(b) Had There Been an Attempt by the Arbitrators to Cover the Costs of Stabilizing the Foundation, the Amount of the Award Would Have Been so Grossly Inadequate as to Amount to Constructive Fraud. (Calif. Civ. Code, section 1288(a).)

There is substantial authority for the rule of law that a grossly inadequate award may so substantially impair the legal rights of the injured party as to constitute constructive fraud. Although it is unnecessary to rule upon that issue in the present case, in view of the stipulation that the appraisers had omitted to include the cost of stabilizing the foundation in their award, the gross inadequacy of the award to include an amount sufficient to compensate plaintiffs for such expense would justify relief on this basis.

See:

Hetherington v. Continental Ins. Co. of New York (1941), 311 Ill. App. 577, 37 N. E. 2d 366;

Harrington v. Agricultural Ins. Co. (1930), 178 Minn. 510, 229 N. W. 792;

6 Corpus Juris Secumdum, Arbitration and Award, Sec. 90 (and cases cited).

(c) Appellant Is Estopped to Rely Upon the Conditions of the Policy It Has Breached by Its Repudiation of Liability.

Although Appellant made demand upon Respondents to comply with the condition of the policy requiring appraisal, it thereafter repudiated the policy and all liability thereunder, including the amount fixed by the appraisers. Its position now, essentially, is that although it has refused to honor the award, and thus

breached its contract, it will hold Respondents to performance of that condition.

It is firmly settled under California law, however, that one party to a contract cannot compel another to perform when he himself is in default.

Rathbun v. Security Mfg. Co. (1928), 82 Cal. App. 793, 796, 256 Pac. 296;

Karales v. Los Angeles Creamery Co. (1918), 36 Cal. App. 169, 171 Pac. 821;

Wood Curtis & Co. v. Seurich (1907), 5 Cal. App. 252, 254, 90 Pac. 51;

Calif. Civil Code, Section 1439.

Thus, it is held that an insurer who denies liability, waives compliance with the arbitration clause, and cannot rely upon such clause to limit or bar recovery.

Farnum v. Phoenix Ins. Co. (1890), 83 Cal. 246, 23 Pac. 869;

Bass v. Farmers Mut. P. Fire Ins. Co. (1937), 21 Cal. App. 2d 21, 68 P. 2d 302.

V.

The Trial Judge Properly Held That Plaintiffs' Damages Were Incurred During a Period of Continuing Loss, and Appellant's Responsibility Could Not Be Avoided by Its Purported Cancellation.

The Trial Judge found that the damages manifested in 1955 and 1957 were both parts of a continuing loss. Such finding is fully justified, in view of the testimony concerning the manner in which the instability of the underlying soil was created. Thus, from the testimony of the geologist, it was made clear the underground

water continued to accumulate and infiltrate the loose soil, so as to maintain a condition of instability. Damage to the structure would continue to occur until the foundation was stabilized by either soil grouting or beam-caisson underpinning.

Despite attempts of Appellant to marshall decisions in other jurisdictions for the purpose of developing a rule of non-liability after attempted cancellation by an insurer in a progressive and continuing loss situation, the rule applicable in California has been clearly enunciated in a situation almost identical with the facts of the present case.

Thus, in *Snapp v. State Farm Fire & Cas. Co.* (1962), 206 A. C. A. 919, the insured's property was constructed upon fill, which commenced to move laterally during the policy term, thereby damaging the structure and foundation. The trial court awarded damages limited to the amount actually sustained prior to the expiration date of the policy. In reversing this holding of the trial court, the appellate court stated:

> "While the loss sustained up to a given date may have been 'ascertainable,' the question whether the liability of the insurer was *'terminable'* on such date, or whether the defendant was liable for the 'continuing damage or loss' is a *legal* rather than *factual* issue. We have concluded that the trial court erred in deciding this issue.
>
> To permit the insurer to terminate its liability while the fortuitous peril which materialized during the term of the policy was still active would not be in accord either with applicable precedents or with the common understanding of the nature

and purpose of insurance; it would allow an injustice to be worked upon the insured by defeating the very substance of the protection for which his premiums were paid.

Once the contingent event insured against has occurred during the period covered, the liability of the carrier becomes *contractual* rather than *potential* only, and the sole issue remaining is the extent of its obligation, and it is immaterial that this may not be fully ascertained at the end of the policy period." (206 A. C. A. 923.)

Accord:

Harman v. American Cas. Co. (1957, S.D. Cal.), 155 F. Supp. 612.

In the present case, until the foundation of the Lenoffs' home and supporting soil were stabilized, additional manifestations of damage were certain to occur. In such circumstances, Appellant could not unilaterally terminate its contractual obligation arising upon the initial manifestations of damage.

VI.

Plaintiffs' Loss Was Capable of Being Ascertained on or Before the Time of Filing Suit, and the Trial Court Properly Awarded Interest From That Date.

Under Condition 13 of the policy, Plaintiffs' loss was payable 60 days after filing proof of loss or the making of an award. Proof of loss was filed June 28, 1956, and the award of the appraisers was made on September 1, 1956. A denial of liability was made shortly after such award.

Under Section 3287 of the California Civil Code, interest is allowable where the amount of the defendant's obligation is certain or capable of being made certain by calculation. California decisions are liberal in interpreting the phrase, "capable of being made certain by calculation."

In *Koyer v. Detroit Fire and Marine Insurance Co.* (1937), 9 Cal. 2d 336, 70 P. 2d 927, the insured premises were totally demolished by earthquake. The policy required appraisal of the loss, and, although attempts were made to accomplish such appraisal, it was never consummated. Proceeds of the policy were payable 90 days from filing proofs of loss. Rejecting the insurer's contention that interest should be computed only from the time of judgment, rather than before that time, the Supreme Court held:

> "Whether interest was chargeable prior to judgment depends upon the application of section 3287 of the Civil Code, under which interest runs on claims for damages certain or capable of being made certain from the date the right of recovery is vested. If, therefore, the amount of plaintiff's loss was capable of being made certain by calculation, interest was allowable from July 12, 1933, when the loss became payable. It would seem to admit of no doubt that an ordinary fire or earthquake loss is adjusted by calculation, whether it be a total or partial loss." (p. 345.)

Chase v. National Indemnity Co. (1954), 129 Cal. App. 2d 583, 278 P. 2d 681, involved a policy of insurance on a truck and van which were destroyed in a collision. The insurer denied coverage and an ac-

tion ensued. In rejecting the contention that interest should not have been awarded from the date payment was due under the policy, but instead from only the time of judgment, the court stated:

> "The reason for denying interest on claims is that where the person liable does not know what sum he owes, he cannot be in default for not paying. (Citation.) When the exact sum of the indebtedness is known or can be ascertained readily, the reason suggested for the denial of interest does not exist. (Citation.) In the instant case the evidence was undisputed that the equipment was totally destroyed. National took charge of the salvage and could ascertain from it and from list prices on the equipment what the fair market value was on the date of loss. Resort may be had to appraisers if necessary (Citation.), and other means to arrive at fair market value. The mere unwarranted denial of the validity of the contract, or liability thereunder, on the part of the insurance company will not have the effect of defeating the right to recover interest otherwise recoverable." (129 Cal. App. 2d p. 865.)

See also:

> *Snapp v. State Farm Fire & Cas. Co.* (1962), 206 A. C. A. 919, 923.

There does not appear to be any valid reason why the amount necessary to stabilize the underlying soil could not have been ascertained by Defendant herein prior to the filing of suit, and an appraisal had already been made of the costs of repairing the structural damage. Any failure to make such ascertain-

ment was not the fault of Plaintiffs, but was the fault of Defendant in denying responsibility for the entire claim.

Defendant does not suggest when damages were capable of ascertainment, other than that it was not before October 26, 1956, when suit was filed. Although Plaintiffs are confident that such amount could have been ascertained by that date, certainly they were ascertainable, and had actually been ascertained, by September of 1959, when repairs were accomplished. No quarrel has been made with the items of repair, and, indeed, the amounts thereof were stipulated to at the trial as being reasonable.

Conclusion.

It is submitted that the Trial Judge correctly determined all issues, and that the judgment should be affirmed.

Dated this 26 day of February, 1963, at Los Angeles, California.

Respectfully submitted,

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Certificate.

I certify that in the preparation of this brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that this Brief, in my opinion, does comply therewith.

VERNON G. FOSTER